Supreme Court, U.S.
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In The

Supreme Court of the United States

EUGENE W. SLATTERY,

Petitioner,

vs.

SWISS REINSURANCE AMERICA CORP.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What are the precise circumstances in which a plaintiff will be required to submit evidence, beyond establishing a *prima facie* case and presenting evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false, in order to survive a motion for summary judgment?

2. Are there divergent views among the Circuits, since *Reeves v. Sanderson Plumbing Products, Inc.*, on the necessity of proof in addition to findings of a *prima facie* case and evidence of pretext?

3. Whether the Second Circuit, in demanding more than a *prima facie* case and evidence of pretext, decided *Slattery* in a way that conflicts with the standards set forth in *Reeves v. Sanderson Plumbing Products, Inc.*?

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OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 248 F.3d 87 (2d Cir. 2001) and appears in Appendix A to this Petition at App. 1-16. The Memorandum and Order of the District Court is unpublished and appears in Appendix B to this Petition at App. 17-29.

JURISDICTION

The Opinion and Judgment of the Court of Appeals were entered on May 3, 2001 and amended on June 6, 2001. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

29 U.S.C. § 623(a)(1)

The Age Discrimination in Employment Act of 1967 ("ADEA"), as amended, makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."

STATEMENT OF THE CASE

1. Factual Background

Petitioner Eugene W. Slattery ("Slattery") contends that defendant Swiss Reinsurance America Corp. ("Swiss Re") violated the ADEA when it terminated him at age 53. At the time of his termination, he was the oldest of a group of six employees assigned to Swiss Re's Northeast Business Development Unit ("NEBDU"). For the two years preceding Slattery's termination, 1998 and 1999, neither he nor any other member of NEBDU brought in any new business. However, Slattery proved that for the previous three years, 1995, 1996 and 1997, he brought in more new business than all of the other NEBDU members combined. Yet Slattery was the only one fired; the five younger employees were not affected. The reason proffered for Slattery's termination — that he brought in no new business in 1998 and 1999 — was a pretext for age discrimination.

Slattery also proved that the Chief Executive Officer of Swiss Re, Walter Kielholz, made statements that he intended to make the image of Swiss Re younger and that he had in fact reduced the average employee age to 39. Slattery also introduced statements by management, including one by his superior, who approved his termination. These were dismissed as mere "stray remarks."

2. Proceedings in the District Court

The District Court concluded that "because no reasonable juror could decide this case in Plaintiff's favor on any of his claims, Defendant's motion for summary judgment is granted." (App. 29).

The District Court decided that Slattery did not establish a *prima facie* case because he did not show that "he was performing his duties satisfactorily" nor did he prove any inference of discrimination based upon his age. (App. 22). The Court found that various statements by management, claimed by Slattery to be evidence of discriminatory animus, were stray workplace remarks. (App. 24-25). The Court did not consider the comments of Chairman Kielholz because it found no nexus between Kielholz's remarks and Slattery's discharge. (App. 25).

3. Proceedings in the Court of Appeals

The Court of Appeals affirmed the judgment of the District Court although it found error in two major respects. First, it found that the District Court "overstated the requirements for a *prima facie* case" by requiring Slattery to demonstrate that "he was performing his duties satisfactorily" instead of simply showing that he was "qualified for the position." (App. 8-9).

Error was also found in the District Court's assessment "of the most significant piece of evidence Slattery presents in support of his *prima facie* case: Kielholz's statement that he intended to make the image of Swiss Re younger and that he had in fact reduced the average employee age to 39." (App. 9-11). The District Court excluded this statement from consideration. The Second Circuit found it relevant to Slattery's *prima facie* case. Other statements proffered by Slattery as evidence of discrimination were determined to be either age neutral on their face or mere "stray remarks." (App. 10).

The Court of Appeals concluded that "the problem for Slattery is that the Kielholz statement on which he relies heavily, considered in the context of the case as a whole, and even combined with the possibility that Swiss Re's statements about lack of new business were pretextual, does not in the end carry the burden Slattery bears of showing he was treated adversely for discriminatory reasons." (App. 13).

REASONS FOR GRANTING THE WRIT

Just as the Fifth Circuit did in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 146 (2000), the Second Circuit "misconceived" the evidentiary burden borne by Slattery because it reviewed the evidence in such manner that Slattery's *prima facie* case, combined with sufficient evidence to disbelieve the employer's legitimate nondiscriminatory reason, was insufficient as a matter of law to survive a motion for summary judgment. In essence, the Second Circuit required Slattery to offer some evidence beyond the above two categories.

Justice Ginsburg, in her concurring opinion in *Reeves v. Sanderson Plumbing Products, Inc.*, wrote:

> that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion for judgment as a matter of law.

Reeves, 530 U.S. at 154. It is respectfully submitted that *Slattery* is an appropriate case.

Additionally, it is incumbent on this Court to define these circumstances more precisely because the various circuit courts are ignoring the lesson of *Reeves* by requiring different and conflicting proofs from the employment discrimination plaintiff.

In *Zimmermann v. Associates First Capital Corp.*, 251 F.3d 376 (2d Cir. 2001), Judge Newman emphasized the differences between the Second Circuit and the Fourth and Fifth Circuits in the type and amount of proofs required. He stated that:

> Since *Reeves*, the case law has been developing as to what sort of a record will permit a plaintiff who presents evidence of a *prima facie* case and evidence of a pretext to have a jury consider the ultimate issue of discrimination and what sort of record will entitle a defendant to judgment as a matter of law. The Fifth Circuit appears to understand *Reeves* to mean that a *prima facie* case and evidence of pretext take a case to a jury in the absence of *"unusual circumstances* that would prevent a rational fact-finder from concluding that the employer's reasons for failing to promote her were discriminatory and in violation of Title VII." *Blow v. City of San Antonio*, 236 F.3d 293, 298 (5th Cir. 2001) (emphasis added); *see also Evans v. City of Bishop*, 238 F.3d 586, 592 (5th Cir. 2000) (noting that the "Supreme Court in *Reeves* emphasized the importance of jury fact finding and reiterated that evidence of the prima facie case plus pretext may, *and usually does*, establish sufficient evidence for a jury to find discrimination.") (emphasis added). The Fourth Circuit has observed that if the plaintiff proves a *prima facie* case and pretext, her claim must go to a jury

> unless "there is evidence that precludes a finding of discrimination." *Rowe v. Marley Co.*, 233 F.3d 825, 830 (4th Cir. 2000).
>
> Our Circuit has not read *Reeves* quite so favorably to Title VII plaintiffs. Without insisting on unusual circumstances or evidence precluding a finding of discrimination, as the Fourth and Fifth Circuits have done, we have simply ruled in several cases that a record that included evidence of a *prima facie* case and evidence permitting a finding of pretext did not suffice to permit a finding of discrimination. *See Slattery v. Swiss Reinsurance America Corp.*, 248 F.3d 87, 94 (2d Cir. 2001); *James v. New York Racing Ass'n*, 233 F.3d 149, 157 (2d Cir. 2000); *Schnabel v. Abramson*, 232 F.3d 83, 91 (2d Cir. 2000). The task, as outlined in these decisions, is to examine the entire record and, in accordance with *Reeves*, make the case-specific assessment as to whether a finding of discrimination may reasonably be made. *Slattery* noted that "the Supreme Court has indicated that only occasionally will a *prima facie* case plus pretext fall short of the burden a plaintiff carries to reach a jury on the ultimate question of discrimination" but that "such occasions do exist." *Slattery*, 248 F.3d at 94 (citing *Reeves*, 530 U.S. at 148, 120 S.Ct. 2097).

Zimmermann, 251 F.3d at 381-82.

The Sixth Circuit, since *Reeves*, has stated that "the probative value of pretext in a discrimination case has been reaffirmed, and we are reminded that when the elements of a *prima facie* case have been met, a plaintiff need not show both pretext and discriminatory intent

("pretext plus")." *Ross v. Campbell Soup Co.*, 237 F.3d 701, 708 (6th Cir. 2001).

The Ninth Circuit, citing *Reeves*, has observed that " '[a]s the Supreme Court recently reaffirmed, a disparate treatment plaintiff can survive summary judgment without producing any evidence of discrimination beyond that constituting his prima facie case, if that evidence raises a genuine issue of material fact regarding the truth of the employer's proffered reasons.' " *Snead v. Metropolitan Property & Cas. Ins. Co.*, 237 F.3d 1080, 1094 (9th Cir. 2001).

After an examination of the entire record, the Eleventh Circuit concluded that the plaintiff could withstand a motion for summary judgment on the basis of her *prima facie* case, combined with sufficient evidence to find that the employer's proffered reasons for termination were pretextual. *Hinson v. Clinch County, Ga. Bd. of Educ.*, 231 F.3d 821, 832 (11th Cir. 2000). For a general description of the conflicting standards to avoid summary judgment in the various Circuits, *see* Vantrease, Ryan, Note, *The Aftermath of* St. Mary's Honor Center v. Hicks *and* Reeves v. Sanderson Plumbing Products, Inc.: *A Call for Clarification*, 39 BRANDEIS L.J. 747 (2001).

It is clear that *Slattery* would have fared far better in the Fourth, Fifth, Sixth, Ninth or Eleventh Circuits. Certiorari is warranted to correct errors in the Second Circuit and to clarify the law for all Circuits.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

July 27, 2001

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: January 11, 2001 Decided: May 3, 2001
Amended: June 6, 2001)

Docket No. 00-7787

EUGENE W. SLATTERY,
Plaintiff-Appellant,

v.

SWISS REINSURANCE AMERICA CORP.,
Defendant-Appellee.

Before: VAN GRAAFEILAND, WINTER, CALABRESI, *Circuit Judges.*

Appeal from the district court's grant of summary judgment to defendant on appellant's claims of age discrimination and retaliation under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and the New York State Human Rights Law. We affirm.

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CALABRESI, *Circuit Judge:*

Eugene Slattery ("Slattery") appeals from the district court's (Brieant, *J.*) grant of summary judgment to Swiss Reinsurance America Corp. ("Swiss Re") on his claims of age discrimination and retaliation under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., and the New York State Human Rights Law ("NYSHRL"). Specifically, he contends that defendant violated the ADEA when it terminated him on February 1, 2000. We affirm.

BACKGROUND

In 1993, Swiss Re hired Slattery, then 46, as an Account Executive/Assistant Vice President in the New York Office's Regional Treaty Marketing Department. In March 1996, Swiss Re's Swiss parent company, under the leadership of its new chairman, Walter Kielholz, reorganized the company. One month later, as part of that reorganization, Maria Wilcox (age 42) promoted Slattery (age 49) to Business Development Manager ("BDM") in the Business Development Unit for the Northeast Region ("Northeast BDU"). At that time, Wilcox reported to Darrius Baker (age 50), the Executive Vice President of the Regional/Specialty Division.

By February 1997, Wilcox was showing signs of dissatisfaction with Slattery's work. In July 1998, Wilcox and Baker reassigned Slattery from his position as BDM to a position as Senior Account Executive. Slattery's responsibilities were diminished, but his salary remained the same. On July 1, 1999, Slattery was placed on probation.

In September 1999, Wilcox was assigned to a new position, and Slattery began reporting to Clay Bassett. Slattery's probation was extended to the end of 1999, and then again to February 1, 2000. On February 1, Bassett terminated Slattery.

Slattery filed a complaint with the Equal Employment Opportunity Commission, received a right to sue letter, and brought this action in federal court. The primary basis for Slattery's case consisted of comments made by his superiors at Swiss Re. Most prominently, Slattery relied on a 1998 interview that Kielholz gave to *Information Strategy*. This interview was subsequently reported in an article which stated:

> Growth and performance are important but not the only marks of success, according to Kielholz. Since taking the helm almost two years ago, Kielholz has been concerned to dispel the perception of Swiss Re as a multinational collection of grey suits and encourage young dynamic staff to join the company. The average age has dropped significantly over the last few years to 39. Kielholz firmly believes that a younger workforce will be more in tune with the knowledge worker spirit. However, Kielholz's most important indice remains IQ. . . . The fact that Kielholz is looking to hire rather than fire staff is testimony to his faith in the knowledge-driven business.

In addition, Slattery pointed to some generalized remarks made by superiors at different times during Slattery's employment that he argues indicate age discrimination. Finally, Slattery offered his personal observations about the post-reorganization comings and goings of other

employees of various ages. Swiss Re both disputed the significance of these allegations and presented the district court with an extensive record of its increasing dissatisfaction with Slattery's work.

As to Kielholz's interview, Swiss Re argued that (1) the statement itself does not indicate discrimination because it does not show a causal connection between the change in average age and age discrimination; (2) there is no evidence that Kielholz participated in any of Slattery's job actions; and (3) there is no indication that Wilcox, Baker, or Bassett knew of Kielholz's comments.

Moreover, according to Swiss Re, Slattery's work began to decline in 1997, shortly after his promotion, and this was documented in Slattery's performance evaluations. Thus, in his February 1997 evaluation, Slattery was found to "meet standards" but to need improvement in visiting branch offices and in his commitment to "target dates and deliverables." In February 1998, Slattery again "met standards" but suffered from the same problems as in the previous year. In addition, at about this time, he was told that he needed to improve his new business production. In July 1998, Slattery's position changed from BDM to Senior Account Executive in order to relieve him of management responsibilities and to allow him to focus on producing new business. He produced no new business in 1998, which proved to be Swiss Re's best year, up to that time, for new business production. Slattery's performance review in January 1999 stated that he "partly meets expectations." But it noted problems with the timeliness of Slattery's reports, lack of leadership qualities, and, most critically, his continued inability to generate new business. It was, Swiss Re asserted, due to this

failure to generate new business, the tardiness of his reports, the poor quality of those reports, and the weakness of his leadership that Slattery was put on probation in July 1999.

Slattery again produced no new business in 1999, which topped 1998 as Swiss Re's most productive year. And on January 4, 2000, Slattery was told that if he did not produce new business before the end of the month he would be terminated. He failed to produce any new business by the deadline, and Bassett terminated him.

In response to Swiss Re's offer of a legitimate business reason for his termination, Slattery produced evidence of pretext. The main alleged reason for which Slattery was fired was his failure to produce new business in 1998, 1999, and the beginning of 2000. Slattery claimed, however, that in 1996 and 1997 he produced more business than anyone else in his unit. Moreover, he contended that no one in his unit produced new business during the relevant time period, and yet he was the only one fired. He also argued that the same evidence that made up his *prima facie* case of discrimination also served to demonstrate pretext.

In addition, Slattery claimed that Swiss Re had retaliated against him for lodging a complaint with the EEOC. Swiss Re replied that the adverse employment actions occurred too long after the lodging of the complaint to raise an inference of discrimination: the probation having occurred eight months after Slattery filed his complaint with the EEOC, and the termination some seven months after that. And Swiss Re also pointed out that Slattery

was fired after "an extensive period of progressive discipline" that began before Slattery lodged his complaint. During this time, "Swiss Re changed his supervisor, twice extended his probation and gave him a final chance to find one well-qualified prospect."

Defendant moved for summary judgment. According to the district court, to make out a *prima facie* case, Slattery had to show "(1) that he belongs to a protected class, (2) that he was performing his duties satisfactorily, (3) that he was discharged, and (4) that his discharge occurred in circumstances giving rise to an inference of discrimination on the basis of his membership in that class." *McLee v. Chrysler Corp.*, 109 F.3d 130, 134 (2d Cir. 1997). The court found (1) that Slattery had not demonstrated that he was "satisfactorily" performing his duties, and (2) that there was no nexus between Kielhoz's [sic] reported remarks in the 1998 interview and Slattery's probation or discharge. This was because Kielholz was not involved in any of Slattery's personnel decisions and the court saw no indication that those who did make such decisions knew of, or acted upon, Kielholz's statements.

The court went on to conclude that even if Slattery had established a *prima facie* case, Swiss Re had provided a legitimate, non-discriminatory reason for Slattery's discharge: its dissatisfaction with his work. "Neither this court nor a jury may determine[ ] on these facts that a requirement for a new business representative to produce at least some new business over a two year period is unreasonable and therefore must be pretextual." Having thus determined that Slattery had failed to demonstrate pretext, the court granted the defendant's motion for summary judgment on the issue of age discrimination.

The district court also granted summary judgment to Swiss Re on Slattery's retaliation claim. Although the court found that Slattery had engaged in protected activity, that Swiss Re knew about it, and that Slattery was placed on probation and fired, it concluded that there was no causal connection between the activity and the adverse employment actions.

Slattery appeals the grant of summary judgment for Swiss Re. We affirm, but on somewhat different grounds from those given by the district court.[1]

DISCUSSION

We review a grant of summary judgment *de novo*, resolving all ambiguities and drawing all inferences in favor of the nonmoving party. *See Holt v. KMI-Continental, Inc.*, 95 F.3d 123, 128-29 (2d Cir. 1996). Summary judgment is appropriate when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. *See Scaria v. Rubin*, 117 F.3d 652, 653 (2d Cir. 1997).

Discrimination

In assessing ADEA claims, we apply the burden shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973), and its progeny. Under

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[1] *See Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 63 (2d Cir. 1997) ("It is beyond cavil that an appellate court may affirm the judgment of the district court on any ground appearing in the record.").

that framework, a plaintiff must satisfy the minimal burden of making out a *prima facie* case of discrimination; the burden then shifts to the defendant to produce a legitimate, nondiscriminatory reason for its actions; and the final burden rests on the plaintiff to prove not only that the proffered nondiscriminatory reason was pretextual but also that the defendant discriminated against the plaintiff. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000).

In order to make out a *prima facie* case of age discrimination, Slattery had to demonstrate that he was "(1) within the protected age group; (2) qualified for the position; (3) discharged; and (4) that such discharge occurred under circumstances giving rise to an inference of discrimination." *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 134 (2d Cir. 2000).

As an initial matter, the district court overstated the requirements for a *prima facie* case. Instead of requiring Slattery to demonstrate that he was "qualified for the position," *id.*, it demanded a showing that "he was performing his duties satisfactorily." We have ourselves used similar language. *See McLee v. Chrysler Corp.*, 109 F.3d 130, 134 (2d Cir. 1997). But in doing so we have not, of course, raised the standard set by the Supreme Court for what suffices to show qualification. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254, (1981); *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n. 44 (1977). Thus a mere variation in terminology between "qualified for the position" and "performing . . . satisfactorily" would not be significant so long as, in substance, all that is required is that the plaintiff establish basic eligibility for the position at issue, and not the

greater showing that he satisfies the employer. The qualification prong must not, however, be interpreted in such a way as to shift onto the plaintiff an obligation to anticipate and disprove, in his *prima facie* case, the employer's proffer of a legitimate, non-discriminatory basis for its decision. As we have repeatedly held, the qualification necessary to shift the burden to defendant for an explanation of the adverse job action is minimal; plaintiff must show only that he "possesses the basic skills necessary for performance of [the] job." *Owens v. New York City Housing Auth.*, 934 F.2d 405, 409 (2d Cir. 1991) (internal quotation marks omitted). As a result, especially where discharge is at issue and the employer has already hired the employee, the inference of minimal qualification is not difficult to draw. *See Gregory v. Daly*, ___ F.3d ___, 2001 WL 293086, at *8-9 (2d Cir. Mar. 27, 2001).

In this case, the court's use of the "satisfactory" rather than the "qualified" language became the basis for a heightened requirement. The district court found that because Swiss Re was dissatisfied with Slattery's work performance, Slattery had not established the second element of a *prima facie* claim. This was error. Although the defendant did properly offer up its dissatisfaction with Slattery's work performance as its legitimate business reason for discharge, there is no basis for the district court's conclusion that Slattery lacked even minimal qualification for a job whose duties he had been performing for seven years.

We disagree as well with the district court's assessment of the most significant piece of evidence Slattery presents in support of his *prima facie* case: Kielholz's statement that he intended to make the image of Swiss Re

younger and that he had in fact reduced the average employee age to 39.[2] Because Slattery had not demonstrated either that Kielholz had been personally involved in the employment decisions regarding Slattery or that those who had been so involved had known about the Kielholz statement, the district court excluded the statement from consideration.

We think the statement is relevant to Slattery's *prima facie* case. We find convincing the Third Circuit's reasoning in *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43 (3d Cir. 1989). In that case, a former employee testified that a senior vice president of defendant company had told him that "Westinghouse Credit was a seniority driven company with old management and that's going to change, 'I am going to change that.' " *Id.* at 54. The *Lockhart* court placed great emphasis on the statement:

> When a major company executive speaks, "everybody listens" in the corporate hierarchy, and when an executive's comments prove to be disadvantageous to a company's subsequent litigation posture, it can not compartmentalize this executive as if he had nothing more to do with company policy than the janitor or the watchman.

Id. The Third Circuit has since reaffirmed this reasoning in a number of cases. *See Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 333 (3d Cir. 1995) ("We have held that a supervisor's statement about the employer's

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[2] The other statements Slattery points to as evidence of discrimination are all either age-neutral on their face or "stray remarks" unrelated to his discharge. Accordingly, we need not discuss them.

employment practices or managerial policy is relevant to show the corporate culture in which a company makes its employment decision, and may be used to build a circumstantial case of discrimination."); *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 642 (3d Cir. 1993) ("The court may also consider as circumstantial evidence the atmosphere in which the company made its employment decisions. One could infer . . . that management permitted an atmosphere of racial prejudice to infect the workplace."); *see also Hunt v. Tektronix, Inc.*, 952 F.Supp. 998, 1006 (W.D.N.Y. 1997) (citing *Lockhart*).

Statements about changing the corporate culture made by top executives surely have probative value as to possibly discriminatory acts on the part of the lower level supervisors. Slattery contends that Kielholz's comment shows that the Chief Executive of Swiss Re was intent on making its employees younger, and that his firing demonstrates that those in charge, down the line, acted accordingly. We hold that such a statement from a top executive in the corporate hierarchy can be enough to establish a *prima facie* case – that is, to raise an inference of discrimination sufficient to shift the burden of explanation onto the defendant. In this case, however, in light of Kielholz's statement that he was "looking to hire rather than fire staff," one may well doubt that a *prima facie* case exists.

Assuming *arguendo* that it does, however, we agree with the district court that Swiss Re easily met its burden of demonstrating a legitimate, non-discriminatory reason for its actions. Swiss Re's dissatisfaction with Slattery's performance, and in particular with his failure to bring in new business, is extremely well-documented. It is manifest from a reading of the record that Slattery went about

his job differently from the way his superiors would have liked. For example, he maintained as clients large firms with small business volume in the hopes of generating more business from them, while Swiss Re repeatedly urged him to generate new clients with initially larger volumes. Not only did Swiss Re, between 1996 and 1999, become gradually and increasingly dissatisfied with Slattery's performance in many respects, but Slattery's supervisors made it absolutely clear that Slattery's future employment depended upon his ability to bring in new business in 1998 and 1999 – a not unreasonable request. Slattery himself concedes that he did not bring in any new business after 1997. Certainly Slattery's late reports, failure to lead, and incapacity to bring in new business – especially in the face of an express requirement that he do so – were legitimate business reasons for his probation and termination.

Under *McDonnell Douglas*, the burden then shifts back to Slattery to demonstrate that Swiss Re's proffered explanation was pretextual. The district court found that Slattery did not prove pretext because, as Slattery conceded, he did not produce any new business in 1998 or 1999. But Slattery contends that Swiss Re's failure to dispute Slattery's claim that he was the largest producer of new business in the Northeast BDU suffices to show pretext at least sufficiently to raise a fact question. And, although Swiss Re claims that 1998 and 1999 were its most productive years, Swiss Re does not point to evidence about the performance of the Northeast BDU. Nor does Swiss Re dispute Slattery's claim that none of his coworkers in the BDU produced any new business in 1998 or 1999 either, and that none of *them* was fired.

Even were we to find this evidence sufficient to raise a fact question as to pretext, such a determination would not end our inquiry. A case-by-case examination is warranted to determine whether the *prima facie* showing plus pretext could satisfy the plaintiff's "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff." *Reeves*, 530 U.S. at 143. Having undertaken such an examination here, we conclude that the plaintiff's proffered evidence fails to warrant a jury trial.

The problem for Slattery is that the Kielholz statement on which he relies heavily, considered in the context of the case as a whole, and even combined with the possibility that Swiss Re's statements about lack of new business were pretextual, does not in the end carry the burden Slattery bears of showing he was treated adversely for discriminatory reasons. *Cf. James v. New York Racing Assoc.*, 233 F.3d 149 (2d Cir. 2000); *Schnabel v. Abramson*, 232 F.3d 83 (2d Cir. 2000); *Fisher v. Vassar*, 114 F.3d 1332 (2d Cir. 1997) (*in banc*).

As part of the very reorganization that Slattery contends began Swiss Re's discriminatory policy, Slattery was himself elevated from Account Executive/Assistant Vice President in New York's Regional Treaty Marketing Department to Business Development Manager in the Business Development Unit for the Northeast Region. And, not only was Slattery thus promoted in 1996 at the age of 49, but his supervisors at the time were also members of the protected class. Wilcox was 42, and Baker was 50. As a result, while an executive's comments revealing a policy of discrimination can give rise to an inference of discrimination, where, as here, the employee

has actually benefitted from the introduction of a new policy, that statement cannot bear much weight. Moreover, although other employees who had failed to produce new business had not been fired, Swiss Re's legitimate business reasons for Slattery's termination went beyond his failure to produce new business. Slattery's supervisors were dissatisfied with the lateness of his reports, the quality of those reports, and his failure to provide leadership. And, with regard to these concerns, Slattery has not demonstrated that his coworkers were similarly situated. Finally, it is clear that *Swiss Re* was dissatisfied with Slattery's responses to its demands that he be more aggressive in seeking new clients from high volume businesses.

We conclude that, even assuming that a jury could believe that by itself the failure to produce new business could not have sufficed to make Swiss Re fire Slattery, the evidence presented by Slattery is not enough to permit a jury to find that the real reason he was fired was his age. We have repeatedly held that, in the end this burden rests on the plaintiff, *James,* 233 F.3d 149; *Schnabel,* 232 F.3d 83; *Fisher,* 114 F.3d 1332, and, as a matter of law, Slattery has not met this ultimate burden.

Retaliation

We analyze a claim of retaliatory discharge under the familiar three-part burden shifting analysis that was also first set forth in *McDonnell Douglas,* 411 U.S. 792; *see Tomka v. Seiler Corp.,* 66 F.3d 1295, 1308 (2d Cir. 1995), abrogated on other grounds by *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742 (1998). In order to make out a *prima*

facie case of retaliation, a plaintiff must show by a preponderance of the evidence "[1] participation in a protected activity known to the defendant; [2] an employment action disadvantaging the plaintiff; and [3] a causal connection between the protected activity and the adverse employment action." *Holt*, 95 F.3d at 130 (internal quotation marks omitted). Moreover, "the burden that must be met by an employment discrimination plaintiff to survive a summary judgment motion at the *prima facie* stage is de minim[i]s." *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994) (alterations in original) (internal quotation marks omitted). Once the plaintiff has established a *prima facie* case, defendant must proffer a legitimate, non-discriminatory reason for the adverse action. If it does so, then the burden shifts back to the plaintiff to demonstrate pretext. *See Tomka*, 66 F.3d at 1308.

It cannot be questioned that Slattery has established the first two elements of a *prima facie* case. (1) Swiss Re was notified of Slattery's complaint to the EEOC in January 1999, and Slattery's protected activity was, therefore, known to the company. (2) Slattery's probation and termination constituted adverse employment actions. The crucial issue is whether Slattery has made out the third element: a causal nexus between his complaints to the EEOC and in federal court and Swiss Re's adverse employment actions.

The only basis Slattery suggests for finding such a nexus is time. He claims that his placement on probation and his subsequent firing followed his complaints closely enough to support an inference of retaliation. It is, of course, true that temporal proximity can demonstrate a

causal nexus. *See Manoharan v. Columbia Univ.*, 842 F.2d 590, 593 (2d Cir. 1988). But in this case the adverse employment actions were both part, and the ultimate product, of "an extensive period of progressive discipline" which began when Swiss Re diminished Slattery's job responsibilities a full *five months prior* to his filing of the EEOC charges. Where timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise.

CONCLUSION

We have considered all of Slattery's arguments and find them without merit. Accordingly, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

EUGENE W. SLATTERY,

Plaintiff,

-against-

SWISS RE AMERICA CORP.,

Defendant.

----------x

99 Civ. 9842 (CLB)

MEMORANDUM & ORDER

Brieant, J.

By motion filed April 18, 2000, heard and fully submitted on May 12, 2000, Swiss Reinsurance America Corp. ("Swiss Re"), defendant in this employment discrimination case based on the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, 623(a)(1) *et seq.* and 623 ("ADEA"), Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 *et seq.*[1] and New York State Human Rights Law, N.Y. Exec. Law § 296 *et seq.* ("NYSHRL"), moves for summary judgment pursuant to Rule 56 Fed.R.Civ.P. Plaintiff filed opposition papers on May 2, 2000. Defendant filed reply papers on May 8, 2000.

FACTUAL BACKGROUND

Plaintiff Eugene Slattery is a fifty three year old resident of the County of Westchester, New York. Mr. Slattery was born March 30, 1947. Defendant Swiss Re is a

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[1] The Amended Complaint states that Plaintiff's claim is "authorized and instituted under Title VII," but contains no specific allegations under that statute.

subsidiary of Swiss Reinsurance Inc., a Swiss corporation. Swiss Re has its principal offices in Armonk, New York.

On January 14, 1993, Swiss Re hired Plaintiff as an Account Executive/Assistant Vice President in New York office's Regional Treaty Marketing Department. Plaintiff was responsible for managing the accounts and prospects of the individual he replaced and for developing new business.[2] Slattery Dep. 57-58. Account Executives must produce new business in order to ensure Swiss Re's growth. *Id.* 194-196. In 1995, Defendant promoted Plaintiff to Vice President. Slattery Dep. 70.

In March 1996, Swiss Re underwent a corporate restructuring. Slattery Dep. 78. In April 1996, Maria Wilcox, Defendant's Northeast Regional Manager promoted Plaintiff to Business Development Manager ("BDM") in the Business Development Unit for the Northeast region. Slattery Dep. 75. The BDM was responsible for producing, underwriting and managing Swiss Re's treaty business in the northeast region. Slattery Dep. 76. The BDM also was responsible for managing a staff. At the time of his promotion, Mr. Slattery was forty-nine years old. Baker Dep. 5.

In February 1997, Ms. Wilcox conducted a review of Plaintiff's performance from April to December 1996. Ex. F. to Shields Aff. Ms. Wilcox gave Mr. Slattery an overall rating of "meets standards" and concluded that Plaintiff

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[2] New business is defined as business that has not been written by Swiss Re for three to five years where there is no pre-existing relationship with Swiss Re. Slattery Dep. 189.

needed to improve his "branch office visibility and interaction" and his "commitment to target dates and deliverables." *Id.* at 4. Plaintiff agreed to work on improving these areas. Slattery Dep. 83-84. Plaintiff believed the review was fair. Ex. F. to Shields Aff. In February 1998, Ms. Wilcox conducted a review of Plaintiff's performance for 1997. Ms. Wilcox gave Mr. Slattery an overall rating of "meets standards," but identified the same performance issues she had identified in the 1997 review. Ex. G to Shields Aff. Ms. Wilcox also indicated that she was "very disappointed in the area of identifying new (not to be defined as expanding existing in-force relationships or increasing our share on existing treaties) business opportunities in 1997." *Id.*

In March 1998, Plaintiff submitted to Ms. Wilcox an action plan for the business development unit. Slattery Dep. 265. Ms. Wilcox and Cynthia Hickman, Director of Marketing, were very critical of the plan and told Plaintiff that the plan had to be totally rewritten. Slattery Dep. 265-266. Defendant claims that between March and July 1998, Ms. Wilcox became dissatisfied with Plaintiff's performance as a BDM because he failed to improve the problems outlined in his performance reviews. Wilcox Dep. 58. Slattery Dep. 247-250. On July 27, 1998, Ms. Wilcox and Darrius Baker, the Executive Vice President Regional/Specialty Division and Ms. Wilcox' superior, informed Mr. Slattery that Defendant was reassigning him from BDM to a Senior Account Executive Position. Slattery Dep. 100. At this meeting, Plaintiff asked if his reassignment was a signal for him to leave the company. Ms. Wilcox and Mr. Baker responded "No," and informed

Plaintiff that he would be a valuable senior account executive. Slattery Dep. 101. While this reassignment was a demotion in terms of Plaintiff's management responsibilities, Plaintiff's salary was not changed. Slattery Dep. 109.

In 1998, Plaintiff did not produce any new business. Slattery Dep. 392-393. At the time, 1998, was Swiss Re's best year for production of new business. Baker Dep. 20. In January 1999, Ms. Wilcox reviewed Plaintiff's performance for 1998. Ex. I to Shields Aff. Ms. Wilcox noted that Plaintiff needed improvement in timeliness, development of new business, quality of reports, and leadership. *Id.* Ms. Wilcox noted that Plaintiff had not met the improvement goals of the earlier evaluations or the performance goals for 1998. *Id.* Plaintiff disagreed with this evaluation. Ex. J. to Shields Aff.

On December 18, 1998, Plaintiff filed a complaint with the Equal Employment Opportunity Commission ("EEOC") claiming age discrimination. On June 23, 1999, the EEOC issued Plaintiff a Notice of Right to Sue letter.

On July 1, 1999, Defendant put Plaintiff on probation for lack of progress between January and July 1999 on his performance goals. In Plaintiff's probationary notice, Ms. Wilcox informed Plaintiff of the claimed reasons for the probation and noted that "[i]f significant and sustained improvement in all of the areas noted above is not seen, we will have no recourse but to terminate your employment." Ex. L to Shields Aff. Plaintiff responded to this notice with a detailed memorandum addressing the claimed reasons and appealing the probation decision. Ex. O to Slattery Aff.

In September 1999, Mary Borba, Director of Human Resources, told Plaintiff that Defendant had extended his probation through the end of 1999, because Ms. Wilcox had been reassigned to a new position. Slattery Dep. 385. Ms. Borba informed Plaintiff that he would report to Clay Bassett, who would determine the outcome of Plaintiff's probation. Slattery Dep. 260, 385.

Plaintiff did not produce any new business in 1999, although 1999 was Swiss Re's best year for the production of new business. Slattery Dp. 139, 239. Baker Dep. 20.

On January 4, 2000, Clay Bassett informed Plaintiff that Plaintiff had not satisfied the terms of his probation, but that the term of the probation would be extended until the end of January 2000. Ex. O to Sheilds Aff. The reason for this extension was that Plaintiff's mother was terminally ill. *Id.* Mr. Bassett told Plaintiff that Plaintiff would be taken off probation if he brought in *any* new business by the end of January. Slattery Dep. 396-398. He did not, and on February 1, 2000 Plaintiff's employment was terminated. Slattery Dep. 288. Plaintiff was not replaced after he was terminated. Baker Dep. 50.

Plaintiff commenced this action on September 17, 1999. On March 7, 2000, Plaintiff amended his complaint.

DISCUSSION

The standards for granting summary judgment in this Circuit are so well known as to obviate the need for

citation. We note, however, that all facts must be viewed in the light most favorable to the non-moving party.[3]

Age Discrimination

To establish a *prima facie* case of age discrimination, Plaintiff must establish "(1) that he belongs to a protected class, (2) that he was performing his duties satisfactorily, (3) that he was discharged, and (4) that his discharge occurred in circumstances giving rise to an inference of discrimination on the basis of his membership in that class." *McLee v. Chrysler Corp.*, 109 F.3d 130, 134 (2d Cir. 1997); *Fisher v. Vassar College*, 114 F.3d 1332, 1335 (2d cir. 1997), *cert. denied*, 522 U.S. 1075 (1998). Plaintiff has established the first and third elements. Plaintiff, however, has not established that he was performing his duties satisfactorily or that there is an inference of discrimination based upon his age.

In order to establish the second element of his claim, Plaintiff must show that he was meeting Defendant's legitimate performance criteria at the time of his discharge. *Thornley v. Penton Publ'g, Inc.*, 104 F.3d 26, 29 (2d Cir. 1997). The record shows that Defendant repeatedly

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[3] Employment discrimination claims brought under the NYSHRL and the ADEA are analyzed identically. *Wanamaker v. Columbian Rope Co.*, 108 F.3d 462, 467 (2d Cir. 1997) The Court's analysis applies to both Plaintiff's federal and state law claims, and the Court need not address the state law claims separately. *Brennan v. Metropolitan Opera Ass'n*, 192 F.3d 310, 317 n.2 (2d Cir. 1999).

raised with Plaintiff performance issues concerning producing new business, submitting reports in a timely matter, and improving his leadership qualities. Plaintiff admitted that he did not satisfy the "new business" performance goal in 1999, and has not provided evidence that he achieved any of the other performance goals. Slattery Dep. at 387. The fact that Plaintiff had "disconnects" or disagreements with Ms. Wilcox regarding these goals does not raise a triable issue of fact relating to them. Plaintiff's personal disagreement with the performance goals or Ms. Wilcox' assessment of his performance is not material. *Thornley,* 104 F.3d at 30 ("an employer who is sued on allegations of age discrimination is not compelled to submit the reasonableness of its employment criteria to the assessment of either judge or jury.")

Plaintiff has not provided facts which can give rise to the inference of discrimination. Plaintiff testified that he had no problems with Mr. Bassett, the individual who decided to terminate Plaintiff's employment. Plaintiff was hired and promoted when he was over the age of forty. Slattery Dep. 75. Plaintiff's supervisors were over the age of forty at the time of Plaintiff's termination, and Mr. Baker was over the age of fifty at the time. As to Plaintiffs probation, Ms. Wilcox promoted Plaintiff, demoted Plaintiff and placed Plaintiff on probation. When the same actor makes both positive and negative employment decisions, the employer is entitled to an inference that there was no discriminatory intent on its part. *Grady v. Affiliated Cent.*, 130 F.3d 553, 560 (2d Cir. 1997), *cert. denied* 525 U.S. 936 (1998). Plaintiff can not overcome this inference.

Plaintiff alleges that various statements made by Swiss Re Management give rise to the inference of discriminatory intent. Plaintiff calls to the Courts attention five such statements: 1) Ms. Wilcox' statement in July 1998, that Plaintiff was "not a visionary thinker;" 2) Ms. Wilcox' explanation of the 1996 restructuring of Swiss Re by stating "it's our turn now"; 3) A statement by Heidi Hunter, Defendant's CEO that the Swiss are not sure that "they had the right team" to operate in America; 4) Mr. Baker's comment to Mr. Gibson, made outside of Plaintiff's presence, that "when you approach 55, you no longer have anything to bring to the table." Ex. P to Slattery Aff.; and 5) Swiss article by Mr. Kilholz, the Chairman of Defendant's parent company, which stated that "the average age has dropped significantly over the last few years to 39," and "a younger workforce will be more in tune with the knowledge worker spirit," and which encouraged a "young dynamic staff to join the company." Ex. 1 to Amended Complaint.[4]

The first three statements are age neutral and do not imply a discriminatory motive. Mr. Slattery's subjective belief that they referred to age is insufficient. There is no

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[4] Plaintiff also claims discriminatory intent can be shown because of a job description for a position in Tallinn, Estonia published in the *Swiss Re News* which states that "the ideal candidate will be aged between 35 and 45." Ex. 3 to Amended Complaint. This description is irrelevant however, for two reasons. The position was not with Swiss Re America, but was a position involving Swiss Re, Inc. and Swiss Re Zurich. There is no evidence that Plaintiff sought or applied for a position in Tallinn, or that United States statutes would apply to employment in Estonia by a foreign corporation.

evidence of any connection between Mr. Baker's comment and Plaintiff. Stray workplace remarks without a clearly demonstrated nexus to the adverse employment action sued upon are insufficient to defeat a motion for summary judgment. *Spence v. Maryland Casualty Company*, 995 F.2d 1147 (2d Cir. 1993). Mr. Baker's comment was made more than two years before Plaintiff's termination, and was not directed at Plaintiff. Further, the conversation was held in terms of retirement, not termination of employees. Mr. Baker is planning to retire at age 55. Baker Dep. at 4.

There is no evidence of any nexus, much less a clearly demonstrated one, between Mr. Kilholz' Swiss article and Plaintiff's probation or discharge. There is no evidence that any of the individuals involved in Plaintiff's discharge saw or read the articles. Slattery Dep. at 437. Mr. Kielholz was not involved in any of the employment decisions regarding Plaintiff. *Id.* Plaintiff's conclusory assertion that Baker knew of the articles or would have acted upon them in a discriminatory manner is not proof of discrimination. *Bickerstaff v. Vassar College*, 196 F.3d 435, 452 (2d Cir. 1999), *petition for cert. filed* (March 21, 2000) ("Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment."). The "average age" comment does not create an inference of discrimination as there is no explanation of the cause of the change in average age. *Hollander v. American Cynamid Co.*, 172 F.3d 192, 203 (2d. Cir. 1999), *cert. denied* 120 S.Ct. 399 (1999) (an "inference of discrimination solely on the basis of raw numbers is impermissible in the absence of any attempt to account for other causes of the

age 50-59 anomaly."). Further, the article continues by saying that "Kielholz's most important indice remains IQ," further reducing any inference of age discrimination. Ex. 1 to Amended Complaint.

Plaintiff also suggests that his personal observations regarding the termination of older employees and the hiring of younger individuals to senior management positions suggests a discriminatory intent. Plaintiff's observations are simply raw data, and can not establish a *prima facie* case of age discrimination. *See Hollander*, 172 F.3d at 203. "In short, the data presented by [Plaintiff] . . . does not make it any more less likely that [Defendant] is liable for age discrimination." *Id.*

Where Plaintiff has established a *prima facie* case of discrimination, Defendant has the burden of providing a legitimate non-discriminatory reason for the challenged employment decision. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-507 (1993). Defendant "is required to articulate – but not prove – a legitimate, non-discriminatory reason for the discharge." *Dister v. Continental Group, Inc.* 859 F2d 1108, 1115 (2d Cir. 1988). The legitimate reason does not have to be one with which the Court or the jury agrees. "ADEA does not make employers liable for doing stupid or even wicked things; it makes them liable for discriminating, for firing people on account of their age." *Norton v. Sam's Club*, 145 F.3d 114, 120 (2d Cir. 1998), *cert. denied* 525 U.S. 1001 (1998). Once Defendant has articulated such a reason, Plaintiff must prove that the stated reason was false *and* that unlawful discrimination was the real reason. *Fisher v. Vassar College*, 114 F.3d 1332, 1336 (2d. Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998).

Defendant has stated that it discharged Plaintiff because he did not produce *any* new business in 1998, or 1999. Plaintiff attempts to prove this reason was false by providing affidavits of Messrs. Seeber, Wallach & Thieler, executives at insurance companies which Plaintiff "brought in." Slattery Aff. at 20-23. These affidavits all state that Plaintiff was the "key representative" from Defendant. *See* Ex. L, M, N to Slattery Aff. All three affidavits, however, state that these companies began doing business with Swiss re in 1997. *Id; See also* Slattery Dep. 410-411. These affidavits do not discredit Defendant's claim that Plaintiff failed to produce new business in 1998, or 1999. Plaintiff testified that he did not produce *any* new business in these years, further crediting Defendant's proffered reason. Slattery Dep. 287, 392-393. As Plaintiff cannot show that Defendant's proffered reasons were false, Defendant can not establish a claim of age discrimination. Neither this Court nor a jury may determined [sic] on these facts that a requirement for a new business representative to produce at lease *some* new business over a two year period is unreasonable and therefore must be pretextual.

Retaliation

To establish a *prima facie* case of retaliation, an employee must show: (1) participation in a protected activity that is known to the employer; (2) an employment decision or action disadvantaging the employee; and (3) a causal connection between the protected activity and the adverse decision. *Richardson v. New York State Department of Correctional Service*, 180 F.3d 426, 443 (2d Cir. 1999). Plaintiff claims he was placed on probation

and eventually fired because he filed an administrative complaint with the EEOC and thereafter filed this lawsuit.

Both of these actions are protected activities, and both were known to Defendant. Plaintiff's probation and eventual termination are employment decisions which disadvantaged him. Plaintiff, however, has not shown any facts establishing a causal connection between either his EEOC filing or his lawsuit, and his probation for failure to produce, and his subsequent termination.

Plaintiff can prove a causal connection by "showing that the protected activity was closely followed in time by the adverse employment action." *Manoharan v. Columbia*[4] [sic] *Univer.*, 824 F.2d 590, 593 (2d Cir. 1998). Defendant placed Plaintiff on probation more than seven months after, and terminated Plaintiff's employment more than a year after, Plaintiff filed his administrative complaint with the EEOC. Plaintiff was terminated five months after he commenced this action.[5] Such large gaps of time between the events and the termination or probation make time alone insufficient to establish a causal connection. *See e.g., Hollander v. American Cynamid Co.*, 895 F.2d 80, 85-86 (2d Cir. 1990) (three months between alleged discrimination and protected activity standing alone insufficient to establish a causal connection). Plaintiff has not alleged any other facts which would show a causal connection between his protected activities and the employment decisions.

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[5] Plaintiff was placed on probation before he filed this lawsuit. This lawsuit can not be the basis of a retaliation claim relating to Plaintiff's probation.

CONCLUSION

Because no reasonable juror could decide this case in Plaintiff's favor on any of his claims, Defendant's motion for summary judgment is granted. The clerk shall enter a final judgment.

SO ORDERED

Dated: White Plains, New York
May 22, 2000

/s/ CHARLES L. BRIEANT
Charles L. Brieant, U.S.D.J.

Supreme Court, U.S.
FILED
AUG 30 2001
CLERK

No. 01-197

IN THE

Supreme Court of the United States

EUGENE W. SLATTERY,

Petitioner,

v.

SWISS REINSURANCE AMERICA CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Swiss Reinsurance America Corporation, is a wholly-owned subsidiary of Swiss Re America Holding Corp., a Delaware corporation.

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REASONS FOR DENYING THE WRIT

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), this Court reversed the judgment of the Fifth Circuit Court of Appeals in favor of the employer because that Court imposed an incorrect evidentiary burden on the plaintiff/employee. In *Reeves*, this Court's message was clear — there are no automatic rules for assessing liability based on the type of evidence presented at trial or the summary judgment stage. In some cases, proof of a prima facie case of discrimination combined with some evidence that the employer's explanation for an adverse employment action is not true will be sufficient to support a finding of liability. In others, it will not be. Liability should not be determined based on the type of evidence presented. The strength and quality of evidence, whether it be "prima facie evidence," "evidence of falsity" or "direct evidence," should drive the Court's judgment as to whether a plaintiff has satisfied the ultimate burden of proof.

In affirming judgment for Respondent, the Second Circuit applied precisely this type of individualized assessment of the evidence. The Second Circuit evaluated the strength of the evidence consistent with the three factors referenced in *Reeves*, i.e., the strength of the prima facie case (which it found weak), the evidence that the employer's explanation was not true (which it found weak), and the other evidence presented by Respondent in support of its explanation (which it found significant). The Second Circuit did exactly as this Court instructed.

Petitioner's suggestion that he would have fared better in other Circuits because other Courts of Appeals apply

Reeves differently than the Second Circuit is not supported by the case law he cites. There is no conflict among the Courts of Appeals. It appears that the Courts of Appeals are applying a case-by-case examination of the evidence.

What Petitioner seeks is exactly what *Reeves* rejected — a blanket rule. Petitioner seeks a rule that would *always* require a jury trial whenever a plaintiff presented a prima facie case and evidence to support a jury finding that the employer's explanation for the action at issue was not true. Petitioner ignores the express statements in *Reeves* that there might be circumstances where evidence of a prima facie case and pretext are not enough to support a jury verdict. Indeed, if Petitioner's view were accepted, as the Court observed in *Reeves*, motions under Federal Rules of Civil Procedure 50 and 56 would be rendered meaningless whenever a plaintiff presented evidence of a prima facie case and pretext.

ARGUMENT

I. In *Reeves*, This Court Rejected Blanket Rules Or Formulas And Instructed Lower Courts To Assess The Strength Of Evidence To Determine If A Plaintiff Met The Ultimate Burden Of Proof.

In *Reeves*, this Court granted certiorari:

> to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination (as defined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory

> explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination.

Reeves, 530 U.S. at 140. This Court held that "a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability," and that "the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination." *Id.* at 149.

This Court expressly stated, however, that holding that such evidence may permit a finding of liability "is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability." *Id.* at 148. (emphasis in original). The Court noted that "[c]ertainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Id.* This Court offered two examples of such instances. First, the Court stated "an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision[.]" *Id.* Second, the Court noted judgment in favor of an employer would be appropriate "if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.*

The Court stated that whether judgment for the employer was proper would depend on a number of factors including "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Id.* at 148-149.

Slattery's suggestion that he was entitled to a jury trial merely because he presented a prima facie case and some evidence of pretext misses *Reeves'* most fundamental message: *there are no blanket rules.*

II. In *Slattery*, The Second Circuit Reached Its Conclusion By Weighing The Evidence In Precisely The Manner Required By *Reeves*.

Citing *Reeves*, the Second Circuit in *Slattery v. Swiss Reinsurance America Corp.*, No. 00-7787, 2001 U.S. App. LEXIS 15058 (2d Cir. May 3, 2001, as amended June 6, 2001) (reprinted in Petitioner's Appendix (hereinafter "Pet. App.") at 1-17) held that "[a] case-by-case examination is warranted to determine whether the *prima facie* showing plus pretext could satisfy the plaintiff's 'ultimate burden of persuading the trier of fact that defendant intentionally discriminated against the plaintiff'." (Pet. App. at 13) The Second Circuit then stated that "[h]aving undertaken such an examination here, we conclude that the plaintiff's proffered evidence fails to warrant a jury trial." (Pet. App. at 13)

The Second Circuit followed exactly the evidentiary scheme described by *Reeves*. It considered all the evidence and evaluated the three factors cited in *Reeves*, i.e., the strength of the plaintiff's prima facie case, the strength of the plaintiff's evidence of pretext, and the strength of the evidence presented by the employer in support of its legitimate nondiscriminatory explanation. (Pet. App. at 10-14) It found the most significant piece of evidence Slattery presented in support of his *prima facie* case was Kielholz's statement that he intended to make the image of Swiss Re younger and he had reduced the average employee age to

39. (Pet. App. at 9-10) The Court found this statement was enough to establish a *prima facie* case, but also found it to be weak evidence of discrimination, noting that "in light of Kielholz's statement that he was 'looking to hire rather than fire staff,' one may well doubt that a *prima facie* case exists." (Pet. App. at 11)

The Second Circuit found Slattery presented evidence of pretext by pointing to evidence Swiss Re did not present. This included: (1) evidence to dispute Slattery's claim that he was the largest producer of new business in the Northeast BDU; (2) evidence about the performance of the Northeast BDU to support its claim that 1998 and 1999 were its most productive years; and (3) evidence to dispute Slattery's claim that his co-workers in the BDU also did not produce new business in 1998 or 1999 but were not fired. (Pet. App. at 12) The Court also viewed this evidence as weak, noting that:

> although other employees had failed to produce new business had not been fired, Swiss Re's legitimate business reason for Slattery's termination went beyond his failure to produce new business. Slattery's supervisors were dissatisfied with the lateness of his reports, the quality of those reports, and his failure to provide leadership. And, with regard to these concerns, Slattery has not demonstrated that his coworkers were similarly situated.

(Pet. App. at 14)

The Second Circuit also noted that Respondent presented strong evidence in support of its asserted legitimate

nondiscriminatory reason. It found Respondent "easily met its burden of demonstrating a legitimate nondiscriminatory reason for its actions." (Pet. App. at 11) It found that Respondent's dissatisfaction with Petitioner's performance, and in particular with his failure to bring in new business, was "extremely well-documented." (Pet. App. at 11) The Court noted:

> It is manifest from a reading of the record that Slattery went about his job differently from the way his superiors would have liked. For example, he maintained as clients large firms with small business volume in the hopes of generating more business from them, while Swiss Re repeatedly urged him to generate new clients with initially larger volumes. Not only did Swiss Re, between 1996 and 1999, become gradually and increasingly dissatisfied with Slattery's performance in many respects, but Slattery's supervisors made it absolutely clear that Slattery's future employment depended upon his ability to bring in new business in 1998 and 1999-a not unreasonable request. Slattery himself concedes that he did not bring in any new business after 1997. Certainly Slattery's late reports, failure to lead, and incapacity to bring in new business — especially in the face of an express requirement that he do so — were legitimate business reasons for his probation and termination.

(Pet. App. at 11-12)

Because it applied the evidentiary burden prescribed by this Court, the Second Circuit's judgment should be given

deference.[1] While this Court, or other Courts of Appeals, or even other panels of the Second Circuit could conceivably view the strength of each party's evidence differently, that does not make it appropriate to grant the Writ. That is a reality inherent in all litigation. Whether a case involves negligence, contracts, patent law, or any other subject, judges could view the same evidence and reach different conclusions on whether it could reasonably support a finding of liability. But if judgment is entered based on a correct application of the law, the case should go no further. To find otherwise would prevent judges from exercising "judgment." And, as observed by the Court in *Reeves*, would effectively insulate an entire category of employment discrimination cases from review under Rules 50 and 56. *Reeves*, 530 U.S. at 148, *citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 524 (1993).

III. There Are Not Divergent Views Among the Courts of Appeals Cited By Petitioner On The Evidentiary Burden Post-*Reeves* — They Apply A Case-By-Case Assessment Of The Evidence To Determine Whether A Plaintiff Has Satisfied The Ultimate Burden Of Proof.

A review of the post-*Reeves* Courts of Appeals decisions cited by Slattery demonstrates that, as instructed by the Supreme Court, the Courts of Appeals are weighing the evidence in each case to determine whether the employer is entitled to judgment as a matter of law. Sometimes the Courts granted judgment as a matter of law; other times they denied it. They did not apply a blanket rule.

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1. Because this analysis is essentially the example provided by the Court in *Reeves*, there also is no need to identify additional circumstances where judgment could be proper for the employer.

A. The Second Circuit Cases Cited By Petitioner Apply A Case-By-Case Analysis Of The Evidence.

In *Schnabel v. Abramson*, 232 F.3d 83 (2d Cir. 2000), the Second Circuit affirmed summary judgment to the employer in an age discrimination case. The Court held that although plaintiff presented evidence of pretext, he "has not demonstrated that the asserted pretextual reasons were intended to mask age discrimination." *Id.* at 88. The Court reached this conclusion by weighing the evidence precisely in the manner required by *Reeves*:

> *Reeves* prevents courts from imposing a *per se* rule requiring *in all instances* that an ADEA claimant offer more than a prima facie case and evidence of pretext . . . But the converse is not true; following *Reeves*, we decline to hold that *no* ADEA defendant may succeed on a summary judgment motion so long as the plaintiff has established a prima facie case and presented evidence of pretext. Rather, we hold that the Supreme Court's decision in *Reeves* clearly mandates a case-by-case approach, with a court examining the entire record to determine whether the plaintiff could satisfy his 'ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff'.

Id., *citing Reeves*, 120 S. Ct. at 2106.

In *James v. NY Racing Assn.*, 233 F.3d 149 (2d Cir. 2000), the Second Circuit affirmed summary judgment for the employer, finding that plaintiff's prima facie and pretext

evidence were insufficient to warrant a jury trial. The Court stated:

> We recognized that in some circumstances the prima facie case and/or evidence of falsity might give powerful evidence of discrimination — more than enough to sustain a plaintiff's verdict — but in others, the two together might fall far short of providing evidence from which a reasonable inference of discrimination can be drawn.

Id. at 154. *James* also follows *Reeves*' lesson:

> (i) evidence satisfying the minimal McDonnell Douglas prima facie case, coupled with evidence of falsity of the employer's explanation, *may or may not be sufficient to sustain a finding of discrimination*; (ii) once the employer has given an explanation, there is no arbitrary rule or presumption as to sufficiency; (iii) the way to tell whether a plaintiff's case is sufficient to sustain a verdict is to analyze the particular evidence to determine whether it reasonably supports an inference of the facts plaintiff must prove — particularly discrimination.

Id. at 156-157.

By contrast, in *Zimmerman v. Associates Firstcapital Corporation*, 251 F.3d 376 (2d Cir. 2001), the Second Circuit affirmed judgment for the plaintiff in a gender discrimination case. The Court held that although the evidence beyond the prima facie case was slight, the plaintiff presented extremely substantial evidence that the employer's explanation was

false, noting that the employer's evidence was "woefully inadequate." *Id.* The Court stated that "*Reeves* instructed that the combination of evidence establishing a prima facie case and evidence showing that a proffered explanation is neither always to be deemed sufficient . . . nor always to be deemed insufficient." *Id.* at 381. The Court stated that "*Reeves* recommended a case-by-case approach," which included a review of the strength of the prima facie case, the probative value of the proof that the employer's explanation was false and any other evidence supporting the employer's explanation. *Id.* at 381. As it did in *Schnabel*, *James* and *Slattery*, the Court outlined its task: "to examine the entire record and, in accordance with *Reeves*, make the case-specific assessment as to whether a finding of discrimination may reasonably be made." *Id.* at 382.

The Second Circuit decisions cited by Slattery do not conflict with the standards set forth in *Reeves*.

B. The Other Courts Of Appeals Decisions Cited By Slattery Also Apply The Same Evidentiary Burden As The Second Circuit Did In *Slattery*.

Petitioner claims that Slattery clearly "would have fared far better in the Fourth, Fifth, Sixth, Ninth or Eleventh Circuits." (Petition at 7). A review of those decisions, however, reveals that they imposed the same evidentiary burden as the Second Circuit did in *Slattery*.

1. The Fourth Circuit

In *Rowe v. Marley Co.*, 233 F.3d 825 (4th Cir. 2000), the Fourth Circuit affirmed the grant of summary judgment to the employer. It did this after reviewing the facts of the

case with *Reeves*' "principles in mind," because the plaintiff failed to demonstrate that the employer's proffered non-discriminatory reasons for discharging him were pretextual. *Rowe*, 233 F.3d at 830-831. The Court stated that:

> in *Reeves* the Supreme Court held that when a plaintiff establishes a prima facie employment discrimination case and that his employer's explanation is pretextual, this does not automatically create a jury question, but it may do so. Even when a plaintiff demonstrates a prima facie case and pretext, his claim should not be submitted to a jury if there is evidence that precludes a finding of discrimination, that is if "no rational factfinder could conclude that the action was discriminatory." [citing *Reeves*, 120 S. Ct. at 2109].

Id. at 830. The *Rowe* court recognized that proof of a prima facie case and pretext will not always create a jury question.

Equal Employment Opportunity Commission v. Sears Roebuck & Co., 243 F.3d 846 (4th Cir. 2001), not cited by Slattery, actually undermines his claim of a "divergent" view. In *Sears*, the Fourth Circuit reversed summary judgment to an employer because the EEOC "made out a *strong* prima facie case of national origin discrimination and offered *ample* evidence to discredit Sears's proffered non-discriminatory reason for its failure to hire Santana." *Id.* at 854 (emphasis added). In doing so, however, the Fourth Circuit expressly referenced and implicitly endorsed both the Second Circuit's reasoning and result in *Schnabel*. *See Sears*, 243 F.3d at 857.

2. The Fifth Circuit

In *Blow v. City of San Antonio*, 236 F.3d 283 (5th Cir. 2001), the Fifth Circuit reversed a grant of summary judgment to the employer where the plaintiff proved her prima facie case, presented sufficient evidence to create a material issue of disputed fact as to whether the employer's explanation was false and there were "no unusual circumstances that would prevent a rational fact-finder from concluding that the employer's reasons for failing to promote her were discriminatory and in violation of Title VII." *Id.* at 298. Whether "unusual" or not, the circumstances referred to by the Court are those cited by *Reeves*, i.e., " 'if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred'." *Id.* at n.3, *quoting Reeves*, 120 S. Ct. at 2109.

In *Evans v. City of Bishop*, 238 F.3d 586 (5th Cir. 2001), the Fifth Circuit also reversed a grant of summary judgment in a race discrimination case in light of *Reeves*, where plaintiff produced evidence of a prima facie case and pretext. The court noted that "*Reeves* instructs that this showing is usually sufficient for a plaintiff's case to survive summary judgment," *Id.* at 591, but, like *Blow*, the reference to "usually sufficient" focuses on the frequency that summary judgment would be granted, not the quality of the evidence.

Crawford v. Formosa Plastics Corp., 234 F.3d 899 (5th Cir. 2000), not cited by Slattery, confirms that the Fifth Circuit applies a case-by-case approach. In *Crawford*, the Fifth Circuit affirmed summary judgment to an employer because the

plaintiff's evidence of pretext was " 'not so persuasive so as to support an inference that the real reason was discrimination'," noting:

> a plaintiff must present "*sufficient* evidence to find that the employer's asserted justification is false." . . . It is, therefore, possible for a plaintiff's evidence to permit a tenuous inference of pretext and yet be insufficient to support a reasonable inference of discrimination. . . . The determination must be made on a case-by-case basis, depending on the nature, extent and quality of the evidence, as to whether a jury could reasonably infer discrimination.

Id. at 903-904 (internal citations omitted). *See also Rubinstein v. Administrators of the Tulande Educational Fund et al.*, 218 F.3d 392, 400 (5th Cir. 2000), *cert. denied*, no. 00-996, 2001 U.S. LEXIS 2446 (2001) (affirming summary judgment for an employer where plaintiff demonstrated pretext because of the "overall lack of any evidence of discriminatory intent," noting "[w]hile we are mindful of the Supreme Court's recent admonition that Title VII plaintiffs need not always present evidence above and beyond their prima facie case and pretext . . . discrimination suits still require evidence of discrimination.")

3. The Sixth Circuit

In *Ross v. Campbell Soup Co.*, 237 F.3d 701 (6th Cir. 2001), the Sixth Circuit reversed a grant of summary judgment to the employer in a disability discrimination case. While the Court did not enumerate the *Reeves* factors in its decision, consistent with *Reeves*, it weighed the evidence noting there was "substantial" evidence that the plaintiff's medical

status played a "significant" role in the employer's decision. *Id.* at 709. *Ross* does not preclude the grant of summary judgment on lesser evidence and does not suggest that the Sixth Circuit applies a blanket rule.

4. The Ninth Circuit

In *Snead v. Metropolitan Property & Cas. Ins. Co.*, 237 F.3d 1080 (9th Cir. 2001), the Ninth Circuit affirmed summary judgment to the employer in a disability discrimination case because, although the employer gave inconsistent statements about the timing of its decision to terminate the plaintiff, there was insufficient evidence of pretext. *Snead*, 237 F.3d at 1094. *Snead* does not support Slattery's position. Because the *Snead* plaintiff had not demonstrated pretext, *Snead* does not establish what evidence the Ninth Circuit deems necessary to survive summary judgment where a plaintiff has demonstrated a prima facie case and pretext. Nothing in *Snead* supports Slattery's suggestion that a plaintiff *never* has to introduce additional evidence beyond a prima facie case and pretext.

5. The Eleventh Circuit

In *Hinson v. Clinch County, Ga. Bd. of Educ.*, 231 F.3d 821 (11th Cir. 2000), the Eleventh Circuit reversed a grant of summary judgment to the employer. The Court examined the record and weighed the strength of the prima facie case, the probative value of the proof that the employer's explanation was false, and any other evidence supporting the employer's case, noting "[w]e have taken those factors into consideration in this case." *Hinson*, 231 F.3d at 831-32. The Court concluded that "this is a case where 'a plaintiff's prima facie case, combined with sufficient evidence to find

that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated'." *Id. quoting Reeves*, 120 S. Ct. at 2109. *Hinson* supports Respondent's contention that the Court must weigh all the evidence and make a case-by-case assessment of whether summary judgment is appropriate. *See also Chapman v. AI Trans.*, 229 F.3d 1012 n.11 (2000) (noting that the "Supreme Court's decision in *Reeves* modified part of our *Combs* [*v. Plantation Patterns Meadowcraft, Inc.*, 106 F.3d 1519 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045, 118 S. Ct. 685 (1998)] decision. We had stated in *Combs* that judgment as a matter of law was unavailable to an employer once a plaintiff offered sufficient evidence of pretext as to each of the proffered reasons. . . . *Reeves* tells us judgment as a matter of law will sometimes be available to an employer in such a case.")

* * *

The Courts of Appeals decisions cited by Slattery do not establish a blanket rule that those Courts will *always* deny summary judgment where the plaintiff establishes a prima facie case and presents evidence of pretext. Instead, the Courts weigh all the evidence and make a case-by-case assessment as to whether summary judgment is appropriate.

CONCLUSION

Applying the correct evidentiary burden, and considering the strength of all the evidence, the Second Circuit concluded that Petitioner's evidence did not satisfy his ultimate burden of proof. The Second Circuit's decision is consistent with *Reeves* and the decisions of other Courts of Appeals. There is no divergence among the Circuits and no significant question of law for this Court to consider. The Writ should be denied.

Respectfully submitted,

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